UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

GENESIS ELDERCARE CENTERS – CHAPEL MANOR, INC., d/b/a CHAPEL MANOR,

Employer,

Case 4-RC-21340

and

SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199P, CTW,

Petitioner

and

UNITED PLANT AND PRODUCTION WORKERS, LOCAL 175, INTERNATIONAL UNION OF JOURNEYMAN AND ALLIED TRADES.

Intervenor

Charles S. Strickler Jr., Esq., for the Regional Director. J. Michael McGuire, Esq. (Shawe & Rosenthal, LLP), Baltimore, Maryland, for the Employer. Bruce M. Ludwig, Esq. (Willig, Williams & Davidson, P.C.), Philadelphia, Pennsylvania, for the Petitioner.

RECOMMENDED DECISION AND ORDER ON OBJECTIONS

MICHAEL A. ROSAS, Administrative Law Judge. Pursuant to a notice of hearing on objections to election ballots issued by the Acting Regional Director for Region 4, dated November 21, 2007, I conducted a hearing on this matter on December 13–14, in Philadelphia, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the post-hearing briefs submitted by counsel, I make the following findings and conclusions.

In accordance with a stipulated election agreement signed by Service Employees International Union, District 1199P, CTW (the SEIU), and Employer Genesis Eldercare Centers – Chapel Manor, Inc., d/b/a Chapel Manor (Chapel Manor), and approved by the Regional Director for Region 4 on September 24, 2007, an election was conducted on October 26, 2007, in the following unit:

¹ Unless otherwise stated, all dates refer to 2007.

<u>Included</u>: All full-time and regular part-time Certified Nursing Aides, Senior Nursing Aides, Dietary Aides, Housekeeping Aides, Laundry Aides, Recreation Aides, Medical Records Clerks, Medical Supply Coordinator, Ward/Unit Clerks, Maintenance Helpers, and Receptionists employed by the Employer at its facility located at 1104 Welsh Rd., Philadelphia, PA.

<u>Excluded</u>: Cooks, Licensed, Practical Nurses, Registered Nurses, Department Heads, Contractor employees, Rehabilitative Services employees, Assistant Recreation Director, Nursing Clerical Assistants, Managerial employees, and all other employees, guard and supervisors as defined in the Act.

At the election, 83 votes were cast for the SEIU, 66 were cast against, and 6 ballots were challenged. (Bd. Exh. 1.)² The challenged ballots were not sufficient in number to affect the results of the election. However, Chapel Manor timely filed five objections to the election. One of those objections, Objection No. 4, was withdrawn prior to hearing.

Objection No. 1 asserted that the SEIU interfered with the election by photographing employees engaged in Section 7 activity without their consent. Objection No. 2 asserted that the SEIU misappropriated and/or falsified employee signatures, superimposed them on campaign literature, and misrepresented the purpose of petitions that employees signed, Objection No. 3 asserted that the SEIU engaged in improper electioneering by having a prounion employee wear a prounion button in the polling area during the election. Objection No. 5 asserts that the SEIU's supporters engaged in coercion or interfered with the results of the election.

1. The Objections

Objection No. 1

The proponent of an election objection has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Double J. Services*, 347 NLRB No. 58, slip op. at 1–2 (2006). That burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. See *Safeway, Inc.*, 338 NLRB 525 (2002), and cases cited there.

a. The booklet

5

10

15

20

25

30

35

40

45

50

As part of the SEIU's campaign prior to the representation election, Ahmaad Johnson (Johnson), the SEIU's lead organizer, explained the need to publicize employee support for the union. In that regard, Johnson showed employees a leaflet used on another organizing campaign and urged that a similar piece of literature be generated and distributed to employees at Chapel Manor prior to the election. (P. Exh. 22.) As a result, during the weeks leading up to the October 26 election, SEIU organizers sought the participation of Chapel Manor employees in campaign literature. Some employees, like Sharon Gray, a CNA, declined to be included in any campaign literature. (Tr. 131–132.) Many others, however, agreed. They included Mauvalyn Tomlin, Norine Walsh, Donna Davis and Geraldine Polk, all of whom I found credible on this issue, as well as those pertaining to the leaflet and the large flyer that were subsequently distributed. (Tr. 226–230, 240–249, 260–263, 273–278.)

² Board exhibits shall be designated as "Bd. Exh.," Petitioner's Exhibits as "P. Exh." and Employer's Exhibits as "E. Exh."

A total of 45 employees allowed themselves to be photographed and/or provided supporting statements for inclusion in a campaign booklet to be distributed to other employees prior to the election. 41 were photographed and provided supporting statements; 4 employees agreed to provide only supporting statements. 43 employees completed SEIU forms by stating the reasons why "I support forming a union with my coworkers." Each form also contained a preprinted statement above the name and signature lines stating that "I hereby consent, of my own free and independent will, that the above quotation and my photographic likeness be used in conjunction with my name in materials for publication by SEIU 1199P." In the case of the other two employees, Pamela Tucker and Donna Davis, the SEIU obtained separate written consents. Tucker signed her form twice. Her first signature is below her stated reason for supporting the SEIU: "I want fair pay. People are coming in after I've been here for 25 years and are making almost what I make." Her other signature is below a statement that "I authorize this photo quote to be used in literature for the Chapel Manor campaign/SEIU 1199P." Donna Davis signed a nursing note that stated "I want respect to be treated fairly." (P. Exh. 23.)³

The SEIU then compiled the photographs and supporting statements into a booklet. The booklet's cover was entitled, "A Message from SEIU District 1199P/Chapel Manor Organizing Committee," was followed by the SEIU logo, and further states, "We're Voting Yes To Form Our Union Because . . ." Page 2 of the booklet urges the reader to "Vote Yes on Election Day, Friday October 26, 6:30 am-8:00 am & 2:00 pm-5:00 pm, in the employee lounge/vending area on the ground floor." (E. Exh. 3.) Pages 3 through 22 contain the photographs and/or supporting statements of the 45 employees. The booklets were then mailed to Chapel Manor employees' homes on October 22 for receipt a few days prior to the election. (Tr. 334.)

Several witnesses called by Chapel Hill testified they did not authorize the use of their photographs and statements in organizing campaign literature, much less to be identified as members of the union organizing committee. I found the testimony of these witnesses — Deliverance Jean-Philippe, Pierre Claude, Pam Tucker and Sophia Rivera — less than credible, and contradicted by Johnson's more credible testimony and the documentary evidence. While they did not authorize the specific manner in which their photographs and supporting statements would be used, these employees had a reasonable expectation that the photographs and statements would be used in SEIU campaign literature. Moreover, the assertion by several of these witnesses that they thought the consent form was actually an attendance sheet was farcical and seriously diminished their credibility.

Jean-Philippe, a CNA, attended at least two organizational meetings. During the first meeting that she attended, organizers asked to have her picture taken in connection with the campaign. She refused because she was scared. During the second meeting, Regina Simmons, an organizer, again asked Jean-Philippe to take her photograph for use in the campaign. Simmons urged her not to be scared and brought in a coworker and photographed the two of them together. At that meeting, Jean-Philippe also signed a consent form authorizing the use of her photograph and her quote in organizing campaign literature. She also wrote a supporting statement. As a result, her photograph and quote were included at page 8 of the booklet. I credit Jean-Philippe's testimony that she was surprised to see her photograph used alone, since she was photographed together with another employee. I did not, however, credit her assertion that she did not authorize use of her photograph in the campaign, especially as a member of the organizing committee. The consent form provided clear authorization to the SEIU to publish her photograph and her testimony that she thought she was signing an attendance sheet was

³ There are a total of 46 forms, apparently due to the fact that Dorothy Fleet apparently completed two separate consent forms.

incredible. (Tr. 45-51.)

Johnson visited Tucker, a ward clerk, at her home on a Saturday and asked to take her photograph and a quote for use in the organizing campaign. I credited Johnson's testimony, corroborated by a handwritten consent form signed by Tucker, that she agreed to have both her photograph and quote included in campaign literature. (P. Exh. 13B). Tucker's testimony essentially conceded that she provided such authorization, but asserted that she did not agree to have her photograph and quote surface on a publication identifying her as being a member of the union's organizing committee. As previously noted, the authorizations provided the SEIU were general in nature as to how her picture and supporting statement could be used. (Tr. 106–117.)

Johnson called Sophia Rivera, a dietary aide, at her home and asked if he could visit her at her home and speak with her. Rivera agreed and Johnson came over. During the conversation, Johnson asked Rivera if he could take her photograph and explained it would be used in campaign literature. I did not credit Rivera's testimony that Johnson did not inform her as to how the photograph would be used. (Tr. 134–137; P. Exh. 3 at p. 18.) Johnson's testimony that he informed Rivera as to how he intended to use her photograph was corroborated in two respects. The first was a handwritten statement by Rivera that she gave Johnson to accompany the photograph. The second was the consent form that she signed. Again, the form authorized the SEIU to use her photograph and statement "in conjunction with her name in materials for publication by SEIU 1199P." (P. Exh. 15.)

b. The leaflet

25

30

35

40

45

50

5

10

15

20

During the organizing campaign, Johnson also proposed another campaign strategy in order to create momentum for the SEIU – a "march on the boss" planned for September 12. The approach consisted of employees confronting the Director of Nursing (the Director) and demanding he recognize the SEIU. During organizational meetings held prior to September 12, Johnson explained to employees that, after confronting the Director, they would gather for a group photograph that would be used in prounion literature, and then distributed to employees the following day.

On September 12, as planned, Johnson met with a group of employees, including Qwandisia Cooper, a CNA. With Cooper leading the "march," Johnson and the employees walked together to the second floor of the facility and confronted the Director in his office. Cooper then demanded the Director recognize the SEIU, placed her petition on his desk, and was followed by the other employees, who also placed their petitions on his desk. The Director responded that he was not the appropriate person to answer such a request and the employees left. As they left the Director's office, Johnson again told the employees that they would be congregating outside the facility to take a group picture. (Tr. 177–178, 291–298.)

Once outside the facility, Johnson, whom I found credible as to the events of September 12, asked the employees to get together for a group photograph. Many, but not all, of the employees who participated in the "march on the boss" agreed. Some were in a hurry to get home. He told the 19 employees who congregated outside the facility that he was taking the photographs for inclusion in a leaflet that would be distributed to employees the next day. Johnson explained that he would yell "we did it" in order to "let everybody know that we are going to - - that we have a union here at Chapel Manor." Accordingly, he prodded the employees to raise their arms and pump their fists into the air as he proceeded to take several photographs. (Tr. 299–300, 303, 320, 336; P. Exh. 21A–D; E. Exh. 4.)

Chapel Manor produced two witnesses, Richard Rivera, a maintenance employee, and Juanita Toledo, a CNA, to testify that they did not authorize the use of their photograph for publication. Both purported to be clueless as to what was occurring on September 12, suggested they were leaving work and only participated in the group photograph because coworkers asked them to do so. I found neither witness credible. Rivera conceded that he heard about the "march on the boss" and agreed to participate in it. He was evasive, however, as to how he ended up in the group photograph and whether he was actually posing for the photograph. Rivera did acknowledge that it was loud, which is consistent with the group yelling that "we did it." Finally, he conceded signing a sheet of paper, at an earlier time, indicating his support for the SEIU. (Tr. 85–88, 90–97; P. Exh. 11–12.)

Toledo testified that she did not know the purpose of the photograph, but heard her coworkers yell "we did it" as the photographs were taken. She conceded that she panicked when she received the flyer with the group photograph in the mail a few days later and was afraid her husband would see it. Toledo was aware of the organizing campaign, attended organizational meetings, knew Johnson was the SEIU's organizer and signed an authorization card. The evidence overwhelmingly suggests that Toledo knew exactly what was going on.

In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct, whether engaged in by a union or an employer. See *Randell Warehouse of Arizona, Inc.*, 347 NLRB No. 56, slip op. at 5 (2006). That situation, however, does not apply here, as there is ample credible evidence that the SEIU photographed employees with their consent and included their photographs, as well as supporting statements in the SEIU's campaign literature.

25

5

10

15

20

Under the circumstances, I find that Chapel Manor has not met its burden of proving that the SEIU's issuance of the booklet and leaflet constituted conduct that tended to interfere with employees' free choice. Accordingly, I overrule Chapel Manor's first objection.

30

35

40

45

Objection No. 2

During the period prior to the election, the SEIU obtained the signatures of approximately 100 employees on several sheets of 8 1/2" x 11" paper. These sheets, referred to as petitions, stated, "Genesis Workers United" and that "On October 26, We Are Voting YES!" and identified the signatories as members of the "SEIU District 1199P Chapel Manor Organizing Committee." (P. Exh. 8, 10, 12, 13A, 14, 16, 19.) The SEIU then transposed the signatures from the various petitions onto a larger, cumulative version on an 11" x 17" sheet of paper. The 11" x 17" sheet of paper, referred to as the large flyer, contained the same language as the petitions signed by employees. I base these findings on the credible testimony of Johnson, as corroborated by his collection of all of the signatures on separate petitions. (P. Exh. 24; E. Exh. 5; Tr. 324–332.)

Chapel Manor called several witnesses in support of its two contentions – first, that the signatures on the large flyer were falsified and, two, that they never gave the SEIU specific authorization to list them as members of the union organizing committee: Sharon Littlejohn, Richard Rivera, Sophia Rivera, Jean-Philippe, Pam Tucker, Pierre Claude and Laura Hopson. The SEIU does not contest the fact that no one actually signed the large flyer, but asserts that it constitutes a replica of all of the signatures on the petitions.

50

Tucker, Sophia Rivera, Pierre Claude and Lenora Hopson, a CNA, all conceded signing petitions. (P. Exh. 10, 14, 16, 19; Tr. 117, 121–129, 136–137, 145–147, 158, 168–169.) The only point of their testimony was that they never gave specific authorization to have their names

listed as members of the union organizing committee. Richard Rivera conceded this point, as well, but only after being confronted with his signature on a petition in support of the SEIU. (Tr. 100–101; P. Exh. Exh. 12.)

Littlejohn, a CNA, initially denied signing anything, but was startled when confronted with her signature on the petition. She hedged, could not recall and then conceded that it might be her signature. Instead, I adopted the testimony of Maybelline McDowall, who credibly testified that she solicited Littlejohn's support for the SEIU and observed as she signed the petition. Notably, the signature on that document matched Littlejohn's signature on a petition nominating McDowall to be a negotiating committee member. (E. Exh. 5; P. Exh. 9–10; Tr. 74–81.)

As previously stated, Jean-Philippe's assertion that she understood the petition to be an attendance sheet was quite incredible, especially after she was shown a separate attendance sheet that she signed. In fact, she considered both sheets to be the "same thing." On cross-examination, she was consistently evasive by insisting that she did not read anything handed to her at organizational meetings and just signed (P. Exh. 4–5; Tr. 49–59, 72.)

Except for the statement at the bottom that it was issued by the organizing committee, the large flyer distributed by the SEIU contained identical language as the petitions signed by nearly 100 Chapel Manor employees. It is true that no one actually signed the large flyer. Instead, the SEIU copied, cut and pasted the signatures of employees from smaller versions of the same document onto the larger flyer. Chapel Manor contends that such an action is objectionable, however, because the large flyer states at the bottom that it is "[i]ssued by SEIU District 1199P Chapel Manor Organizing Committee." I disagree. First, employees signed petitions containing identical language and their signatures were merely transposed onto the large flyer. Second, the large flyer begins with a reference to "We, the workers of Chapel Manor . . .," is followed by a campaign statement, a statement that "we are voting yes," and the signatures of nearly 100 employees.

As such, a reasonable interpretation of the flyer is that the signatories to the document intended to vote in favor of the SEIU. There is no dispute to that interpretation. It is also the essence of the document. In that context, the statement at the bottom that the large flyer was "issued" by an organizing committee appears insignificant. "Issued" to be this finder of fact simply indicates that costs and distribution of the large flyer were undertaken by the SEIU. There was certainly no "artful deception" of employees. See *BFI Waste Services*, 343 NLRB 254, fn. 2 (2004). Moreover, it is not reasonable to assume that the signatories to the large flyer are members of the organizing committee. Even if that statement could be read to suggest that the signatories are members of the organizing committee, the Board's holdings in representation cases have relied on the premise that employees are mature individuals capable of recognizing campaign propaganda for "what it is." *Albertsons, Inc.*, 344 NLRB No. 158, slip op. at 3 (2005); *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004); *Midland National Life Insurance Co.*, 263 NLRB 127, fn. 4 (1982).

Under the circumstances, I find that Chapel Manor has not met its burden of proving that the SEIU's issuance of the large flyer constituted conduct that tended to interfere with employees' free choice. Accordingly, I overrule Chapel Manor's second objection.

5

10

15

20

25

30

35

40

Objection No. 3

A pre-election conference was conducted in the employee lounge by a Board agent within 30 minutes prior to the representation election on October 26.4 The SEIU was represented by Qwandisia Cooper; Chapel Manor was represented by Charles Cipolla, its senior manager for labor relations. Cippolla testified that the Board agent explained, among other things, that the election area was a "no electioneering zone." The Board agent also gave the parties' representatives in attendance, including Cipolla and Cooper, the opportunity to ask questions, make comments or raise objections.

10

15

20

25

30

35

40

5

As the pre-election conference concluded and everyone except for the parties' observers prepared to leave, Cipolla noticed that Cooper, the SEIU's election observer, was wearing a yellow "Vote Yes" sticker (the sticker) on her jacket. Cipolla did not, however, mention that fact or raise an objection to the Board agent. Instead, he discreetly deployed his cellular telephone to photograph Cooper seated at the election observers' table wearing the sticker on her jacket. (Tr. 24–26, 33–37; Emp. Exh. 7.)

Cooper contradicted Cipolla's version. She testified that, when "she first came in, I had took my jacket off, and folded it over and laid it on the back of my chair. And that's when the conference began, the pre-election conference." Cooper also noted that neither the Board agent nor Cippolla raised any objections during the conference, and insisted that the sticker was not visible after she sat down at the table with Myrtle Chase, Chapel Manor's observer, just before the voting was to begin. However, when confronted on cross-examination with the photograph taken by Cippolla, Cooper still insisted that she removed the sticker after Cippolla left the room and before the election began 7 minutes later. As that stand crumbled upon further questioning, Cooper protested that she never consented to have her photograph taken. (Tr. 183–189.)

Based on the photograph, which fairly and accurately depicts Cooper seated at the election observers' table immediately prior to the commencement of the election, I find Cipolla's version of this event credible. When taken in context with her insistence that she removed her jacket before sitting down at the table, the photograph simply proves Cooper's testimony on this issue to be incredible. Furthermore, I do not credit McDowall's testimony on this issue. She testified that she did not see any employees wearing campaign stickers in the room where voting took place. However, McDowall did not vote until the afternoon session. (Tr. 216–217.) Accordingly, I find that Cooper was wearing a prounion sticker on her clothing at the election observers' table after the election began.⁵

Having established that Cooper was wearing a prounion sticker on her clothing at the election observers' table after the election began, it must be determined whether that action was prejudicial to the conduct of the election. The Board has long held that the wearing of campaign insignia by participants, including observers, at representation elections alone is not prejudicial. *Vegas Village Shopping Corp.*, 229 NLRB 279, 291 (1977); *Furniture City Upholstery Company*, 115 NLRB 1433 (1956). In this case, Cooper was well known as a leader of the SEIU campaign. She was the first employee listed in the campaign booklet distributed to employees and led the "march on the boss." As such, seeing Cooper wear a sticker in support of the SEIU either

50

⁴⁵

⁴ None of the witnesses recalled her name, which is not otherwise discernable from her scribbled signature on the election tally sheet.

⁵ I received the photograph in evidence subject to reconsideration after having an opportunity to research the issue. (E. Exh. 7.) Having had an opportunity to do so, the ruling stands.

served to remind voters that Cooper was a union supporter or that she was the observer designated by the SEIU at the election. It hardly amount to conduct that created a coercive atmosphere for voters.

Last, but not least, is the notion of fairness. Cipolla participated in the pre-election conference and had an opportunity to raise an objection regarding the sticker. He declined to do so and, instead, decided to harvest the moment for a post-election challenge. Accordingly, Cipolla failed to raise an issue as to the allegedly objectionable observer during the pre-election conference and, by deliberately refusing to do so, Chapel Manor waived that objection. See *Detroit East, Inc.*, 349 NLRB No. 87, slip op. at 3 (2007); *In re Liquid Transporters, Inc.*, 336 NLRB 420 (2001).

Under the circumstances, I find that Chapel Manor has not met its burden of proving that the SEIU's election observer engaged in conduct that tended to interfere with employees' free choice. Accordingly, I overrule Chapel Manor's third objection.

Objection No. 5

Chapel Manor's final assertion is that the cumulative nature of the aforementioned allegations, when taken together, destroyed the "requisite sterile laboratory conditions" for conducting an election. The Union's misconduct denied employees free expression of choice." I disagree. The record strongly suggests that, to the contrary, this was an open, well-publicized and hard fought campaign on both sides.

II. Conclusions and Recommended Order

In accordance with the above findings, I conclude that the Objections of Employer Chapel Manor to the representation election held on October 26, 2007 have no merit, are hereby overruled, and the election ruled valid. The case is remanded to the Regional Director for Region 4 to process the matter in accordance with this recommended decision and to issue an appropriate certification.⁶

Dated, Washington, D.C. January 23, 2008

5

10

15

25

30

45

Michael A. Rosas
Administrative Law Judge

6 Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by February 6. 2008.